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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent

v.

SAMUEL OSCAR GONZALEZ, Appellant

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson, Department No. 21  
Pierce County Superior Court Cause No. 10-1-03776-6

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**BRIEF OF APPELLANT**

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pm 11/12/13

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	1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING FOR TO REQUEST AS A JURY INSTRUCTION WPIC 6.05, "TESTIMONY OF ACCOMPLICE", WHERE, WITH A SINGLE ARGUABLE EXCEPTION, THE STATE'S CASE RESTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.	
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**A. ASSIGNMENTS OF ERROR:**

1. Trial counsel was ineffective for failing to request as a jury instruction WPIC 6.05, "Testimony of Accomplice", where, with a single arguable exception, the State's case rested on the uncorroborated testimony of an accomplice.

2. The trial court erred calculating Mr. Gonzalez's offender scores because the three rape convictions should have counted as a single rape.

3. The defendant is entitled to dismissal where the State failed to prove the case beyond a reasonable doubt.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:**

1. A criminal defendant has a constitutional right to the effective assistance of counsel.

2. Trial counsel in a criminal case has the duty to ensure that the trial court properly instructs the jury.

3. Trial counsel in a criminal case lacks no strategic reason for failing to request a mandatory instruction informing the jury to carefully and cautiously view the testimony of an accomplice when there is no corroboration for that testimony.

4. A criminal defendant is entitled to a correct offender score.

5. Serious violent crimes that share the “same objective intent” must be scored as one.

6. The State must prove beyond a reasonable doubt all criminal charges. Failure to do so results in dismissal of those charges..

**C. STATEMENT OF THE CASE:**

1. Procedure.

The State of Washington charged Samuel Oscar Gonzalez in Pierce County Superior Court cause 10-1-03776-6 with the crimes of Rape in the First Degree, 3 counts; Kidnapping in the First Degree, 5 counts; Robbery in the First Degree, 3 counts; and 1 count Criminal Impersonation in the First Degree in the third amended information. CP 84-90.

On October 18, 2012, the matter was called for trial before the Honorable Frank E. Cuthbertson. RP 3. At that time, it was recessed until October 22, 2012 to await a new venire. RP 7-8. On October 22, 2012, due to the lead prosecutor’s illness, the case was continued to November 13, 2012. RP 15.

Trial commenced on November 15, 2012. RP 17. After voir dire and opening statements, testimony began on November 27, 2012. RP 24.

Trial counsel failed to propose as a jury instruction WPIC 6.05, “Testimony of an Accomplice” Appendix A.

In rebuttal argument, the prosecutor argued to the jury that the recorded phone calls and/or plastic cell phone of the testimonial codefendant Jeffrey Lundberg were not the reason for the search warrant:

“That phone call he [Lundberg] made earlier had nothing to do with any law enforcement. Law enforcement heard it, but it wasn’t what set law enforcement off onto Sam Gonzalez there was a reason what they got that search warrant and went there, and it wasn’t because of the cell phone or the phone call that was made by Jeffrey Lundberg in February of that year. RP 1108

Defendant objected to that argument as based on facts not in evidence. RP 1108. The court overruled the objection. RO 1108.

The jury convicted Mr. Reese in all counts. CP 175-189. The court sentenced him to 720 months to life in the Washington State Department of Corrections. CP 236-253. The court scored each of the rapes as separate crimes. *Id* Mr. Gonzalez thereafter timely filed this appeal. CP 254.

## 2. Testimonial Facts.

### a. Custer McDonald’s - Robbery

On October 4-5, 2009, Vivian Garcia worked at the Custer McDonald’s as the swing shift manager. RP 36, 38. She closed the restaurant close to midnight. RP 40. At that time she closed the till, counted the money, placed the money in a deposit bag and put it in the safe for the guard to pick up the next day. RP 40-41. The locked safe can

be opened only with a code. RP 41. Garcia then left the restaurant, driving a co-worker home along the way. RP 42.

As Garcia drove away from the coworker's residence, she was stopped by a car appearing to be the "police". RP 44. Police then entered her car, pulled out a gun, and told her that they knew where she worked. RP 44-45. "Police" ordered her to return to her workplace. RP 45. She complied. RP 46.

At the restaurant a "police officer" ordered her to open the door, open the cash registers, open the safe, and hand over all the bills. RP 46-47. The "police officer" told her that he knew she had two children. RP 48.

After Garcia turned over the cash, the "police officer" handcuffed her to a table, and asked for her keys so that he could exit the restaurant. 48-49. The handcuffs were cheap imitation handcuffs. RP 100.

When the "police officer" left, Garcia determined that she could remove one of her hands from its cuff. RP 51. She extricated herself from the table and called her husband. RP 51-52. She left a message for her husband and then called her supervisor. RP 52. Then, for personal safety, she locked herself inside the freezer. RP 52-53.

After police arrived, they removed the remaining handcuff. RP 55.



During the subsequent investigation, police showed Garcia a photo montage. RP 58. She was not able to identify anyone as her assailant. RP 58.

Garcia knew a co-worker Beatriz Gonzalez, who was Sam Gonzalez's girlfriend. RP 58-59. Garcia previously had seen Sam drop off and pick up Beatriz from work. RP 59. Beatriz was the manager and she sometimes allowed Sam into the restaurant after hours when they were closing. RP 60.

Garcia recalled that Sam was a "a little bit taller than me, kind of chubby". RP 60. Garcia is

Garcia described her assailant to the police as 5'9", white and "skinny". RF 66-67.

The individual was clearly not Hispanic. RP 73.

At trial, Garcia did not know if Sam was 5'9". RP 69. In fact, she had not seen him for 3-4 years. RP 69-70. Garcia's primary language is Spanish. RP 70. The individual who assaulted her spoke English with an American accent. RP 71.

Lakewood Police Department [LPD] Officer Jason Cannon responded to the dispatch to the Custer McDonalds. RP 88, 91. In the course of his investigation, he recovered a black Motorola cell phone from

the ground outside. RP 96-97, 101. The cell phone, which he believed to belong to Garcia, was taken into evidence. RP 97.

The restaurant keys were never found. RP 101. The keys to Garcia's cars were not found. RP 101. The keys to the cash registers were not found. RP 102.

LPD Det. Darin Sales also arrived to assist in the investigation. RP 122. With Officer Cannon, he identified areas for lifting of possible fingerprints, including the swinging door leading behind the counter where the clerks would be. RP 123. Sale reasoned that this would be a good area because it seemed likely that the subject would have had to touch the door to get in and out of the back area. RP 123-124. He also located a second phone, a white cell phone that he believed belonged to Garcia. RP 126.

Sales processed Garcia's phone for fingerprints, extracted some data from it, and then returned it to her. RP 127. He also examined Garcia's car for latent fingerprints and then released it back to her. RP 128-129.

LPD forensic services manager Bryan Johnson examined the handcuffs for fingerprints and could not identify any ridge patterns for useful analysis. RP 132-133, 138.

LPD Officer McLamore showed a photomontage to Garcia. RP 147. The montage contained booking photos, including one of an

individual named Jeffrey Lundberg who was a suspect at that time. RP 146, 148-149. Garcia did not identify any of the photos as the perpetrator. RP 149.

During the investigation LPD Officer Gildehaus contacted Nicole Lundberg, the ex-wife of Jeffrey Lundberg, regarding her knowledge of her ex-husband's activities and also to serve a search warrant for items including a cell phone. RP 190 – 193. While at the residence, Gildehaus dialed the cell phone number and it rang. RP 205. Ms. Lundberg's reaction was one of surprise and upset upon learning that her daughter was in possession a phone that may have been used by Jeffrey Lundberg in the commission of this crime. RP 206.

Police also spoke to Lundberg's girlfriend Heather Samuelson prior to contacting Lundberg. RP 210-211. During this contact Samuelson wrote a note to Lundberg. RP 198. Gildehaus gave the note to Lundberg when he met him at the jail. RP 198.

Gildehaus contacted Lundberg in the Pierce County Jail in September 7, 2010. RP 209. Lundberg was in jail on an unrelated bank robbery charge. RP 207. Gilgehaus informed Lundberg that he wanted to talk to him about a string of robberies to which Lundberg denied any knowledge. RP 196-197, 210. After Gildehaus presented information informing Lundberg that police knew he was involved, Lundberg

responded. RP 197. In fact, police investigation had focused on him as a “person of interest.” RP 208.

Police told Lundberg that they knew Gonzalez was involved and that he had already been arrested on one robbery. RP 197-198. Police also told Lundberg that because he already had an attorney in another case, they would be more comfortable discussing this case in his presence. RP 198-199. The police suggested that they meet in the office of deputy prosecutor Jared Ausserer along with Lundberg’s attorney Ned Jursek to discuss the case. RP 199. Police knew that a proffer letter had been prepared which set forth the State’s expectations for truthful testimony from the defendant as well as the substance of that anticipated testimony. RP 199-200. A defendant expects some consideration in exchange for testimony. RP 200.

On September 9, 2010. Lundberg thereafter gave a statement that was video and audio recorded. RP 202, 209. This statement was taken at the LPD. RP 202.

Although Garcia had not accurately described Mr. Gonzalez to police as her assailant, picked him out of a photo montage, or seen him for three years, Garcia identified Mr. Gonzalez as the defendant in court. RP 60.

b. Burger King – Robbery - October 24, 2009

On October 24-25, 2009, Maria Espinoza, the general manager of a Burger King restaurant on Mountain Highway in Spanaway, closed the restaurant after calling her son Juan Espinoza to pick her up. RP 221-226, 227.

While driving home, Juan noticed a black SUV with bright headlights closely following their car. RP 279. He and his mother then observed police lights behind them. RP 229. When they tried to open the locked gate into their neighborhood, two police officers went to either side of the car. RP 229.

One of the officers ordered Juan out of the car. RP 230, 286. Juan was placed in handcuffs. RP 295. Juan subsequently was placed into the trunk of the car where it was driven back to Burger King. RP 291-293. The person who ordered him into the trunk was “stocky-ish” in build. RP 294.

The other officer pointed a gun at Espinoza, ordered her to the driver’s seat, and told her to drive. RP 231-231. Espinoza stated that she did not drive. RP 231. The driver then ordered her to the back seat and the officer drove her back to the Burger King. RP 231-232.

At the Burger King, Espinoza opened the door with her key. RP 233. Espinoza opened the safe and gave the money to the officer. RP 235. The officer had a firearm. RP 233.

Espinoza never got a good look at the officer. RP 237. The officer wore a hooded sweatshirt. RP 237.

The officer took the telephone when he left. RP 239.

After he left, Espinoza pulled the security alarm. RP 239. When police did not arrive, she left the restaurant and walked around nearby businesses until police arrived. RP 241-242. Just as police arrived, Espinoza observed her son running toward them. RP 242. His hands had been tied behind his back. RP 242.

Juan told police that the both of the men were 5'8" and weighed approximately 130 lbs. RP 318. Mr. Gonzalez weighed at least 239 lbs. at that time. RP 953.

PCSD Det. Stepp responded to the Burger King robbery dispatch. RP 358-361. He contacted area businesses for security videos and determined that the only useful video was the Burger King video. RP 363-364. When he watched that video, he observed Garcia enter the Burger King with a person who appeared to be a male wearing a light colored grey hooded sweatshirt that was pulled up over his head. RP 365. There was a logo on the front of the hoodie. RP 366. The person also wore a

baseball hat and gloves. RP 365. The person held a handgun in the left hand. RP 366. The video showed Garcia emptying the cash drawer and the person retrieving the cash bag. RP 366. The video also showed the person leaving the Burger King in a car that Stepp believed was a Ford Mustang. RP 366.

Police never obtained an actual copy of the video tape. RP 367-368.

Det. Stepp later reviewed another video that showed a pick-up truck pulling into the drive-through at the Burger King and then backing out at approximately 1:59 a.m on October 25, 2009[the morning of this incident]. RP 371-380. There were several individuals in the truck. RP 373-374. Det. Stepp could not determine the race, hair color, or build of these people. RP 374.

In the course of the police investigation, PCSD Det. Mike Hayes requested and received a list of Burger King employees, including terminated employees, during the prior month. RP 398-399. Mr. Gonzalez's name was not on that list. RP 399.

PCSD Det. Jimenez obtained a video from the gated community where Espinoza resided. RP 408, 410-411. The video depicted Espinoza's vehicle driving up to the gate, followed by another vehicle. RP 411. The second vehicle appeared to have flashing "emergency service vehicle

lights.” RP 415. There was no clear photo of the second vehicle, prohibiting any description. RP 416.

c. Wendy’s – Attempted Robbery - Lakewood.

On October 31-November 1, 2009, YZ-F worked at the Wendy’s restaurant with four other people in the hours immediately prior to closing at 2 am. RP 439-440. YZ-F had been driven to work by her mother. RP 439.

After the restaurant closed, YZ-F left in a car driven by her co-worker and boyfriend Lisvi Munoz. RP 440. As they pulled into her apartment parking lot, they noticed a police car with flashing lights behind them. RP 443-444. The car was black with four doors. RP 446. Munoz thought the car was a Nissan Ultima. RP 519.

A male voice came over the speaker directing her to get back inside car, which she did. RP 444, 445. The voice then ordered the driver to get out of the car and to walk backwards toward them . RP 445. Munoz complies. RP 445. They told him he was under arrest and handcuffed him. RP 522.

Munoz observed that one of the men wore dark jeans and a hoodie and a bandana over his face. RP 529. Both men were a little taller than Munoz. One was a little huskier than Munoz and the other man was kind of skinny. RP 520. The tall skinny man was about 5’8”-9” and weighed



about 150 to 200 pounds. RP 541, 544. The other man was about 5'6" and weighed between 200 and 250 pounds. RP 542-544. Munoz is 5'6" and weighed 200 pounds at that time. RP 539.

Lisvi returned to the car moments later wearing cuffs. RP 446. One of the men approached the car and asked YZ-F how to open the trunk. RP 446. After the trunk was opened, they put Lisvi inside. RP 446.

A male with a semiautomatic handgun then asked YZ-F for the keys to the restaurant. RP 448. Because she was not the manager, she did not have the keys. RP 488. The men then took her purse and phone. RP 449.

One of the men had covered his face with something similar to a ski mask and thus only his eyes, nose, and mouth were visible. RP 450. That man kept telling her not to look at him. RP 450. That man also wore a hoodie. RP 450.

The two men then got into the car and told her than they were leaving. RP 452. They drove to a nearby wooded area. RP 452-453. One of the men told YZ-F that since she did not have the keys to the restaurant she would have to give them something else. RP 454. When YZ-F stated that she would not exchange in any sexual activities, the man told her that she needed to do what he said or he would kill her or Lisvi. RP 454.

The man made YZ-F perform fellatio on him and he also inserted his penis and fingers into her vagina. RP 460-461, 462-463, 479. The men took her cell phone and also the money from her purse. RP 480.

The man then ran off into the street. RP 465. YZ-F next saw a black car quickly drive away. RP 465. However, she did not ever see the man get into the black car. RP 500.

Throughout this encounter, the skinnier man was the individual who handcuffed Munoz, asked him how to unlatch the trunk, the skinnier placed Munoz in the trunk and closed it on him, the skinnier man gave directions and orders to the other man, the skinnier man held the gun in his hand. RP 552, 553, 554-555.

Munoz never had any conversation with the other man except when he was in the car and heard the conversation between YZ-F and him. RP 554.

YZ-F and Lisvi ran to her residence and called the police. RP 466. YZ-F described her assailant to the police as "chubby." RP 498.

Subsequent to the police report, YZ-F was examined at Tacoma General by nurse Kelly Morris. RP 562-563, 570. She examined her for physical injuries and found none. RP 577. She performed an external genital exam and saw no injuries. RP 577. She did not perform a speculum

examination. RP 577. The nurse did take vaginal and anal swabs. RP 581-582.

Neither YZ-F nor Munoz were able to identify any suspects from photo montages. RP 741-742.

d. Execution of search warrant on September 2, 2010.

On September 2, 2010, LPD officers executed a search warrant on Mr. Gonzalez's parents' residence at 10313 107<sup>th</sup> Street SW, Lakewood, RP 729. Mr. Gonzalez had a bedroom there. RP 730. In his bedroom, police recovered a baseball cap that said "police". RP 730. The hat appeared to be in good condition. RP 736. They also recovered three pairs of Perry Ellis boxer briefs. RP 732. They noticed cash in the top drawer of the dresser, his wallet, car keys, and miscellaneous paperwork with his name on it as well. RP 735.

The search warrant also authorized the police to search a vehicle. RP 746. They looked for that car, a Volkswagen Touareg, Washington license 302-UJX registered to Evelyn Speaker or Spiker. RP 745-746. They located this car at Larson Volkswagen on South Tacoma Way. RP 746. The police found an envelope with Mr. Gonzalez's name under the right front passenger seat. RP 748.

When police compared photos of the Touareg with a video of the vehicle at the Classic View Estates, they could not determine the color of

the vehicle in the video. RP 754. They could not determine the make or model of the vehicle. RP 754.

Police did not direct their forensic unit to vacuum the Touareg for possible trace evidence. RP 755.

Police obtained a copy of Mr. Gonzalez's driver's license that at the time he obtained his license stated his height was 5'8' and his weight was 205 pounds. RP 745.

e. Jeffrey Lundberg – Testifying Codefendant.

The State called Jeffery Lundberg, the codefendant, to testify against Mr. Gonzalez. RP 762-763. Subsequent to the charged crimes and prior to his testimony, Lundberg had married Heather Samuelson, the woman who gave police the note to give him [which they did] when police arrived at her residence to talk to her. RP 763. That note was not admitted into evidence nor were its contents discussed. *Passim.*

On the date of his testimony, December 5, 2012, Lundberg was in the Pierce County Jail for robbery in the first degree and unlawful possession of a firearm in the first degree. RP 770, 774. That bank robbery occurred on February 8, 2010. RP 770.

When Lundberg first spoke to detective about the bank robbery, he denied any involvement in it. RP 772. He said he did not know anything about it. RP 846. He told the detective that he barely knew Tarin Smith

[his accomplice]. RP 846. Lundberg said all he had done was give Mr. Smith a ride home. RP 847. The bank was close to Lundberg's house. RP 847. Lundberg said that he did not know anything about the \$2,000-\$3,000 that Mr. Smith had on him from the robbery. RP 847. Lundberg did tell police he had a gun in his residence and that he knew he should not have had a gun. RP 847. Lundberg claimed that Smith had snuck into his house and stolen or taken the gun; or at least Lundberg had claimed to the police that this was "a scenario that could have happened." RP 847. Lundberg claimed also to have told the officers "that if – if a gun was used and it happened to be the one in my house, that they could more than – I was more than willing for them to have it." RP 848.

Later on police returned and informed Lundberg that witnesses had seen his car in the area of the bank at the time of the robbery and that there had been another individual. RP 848. Lundberg said he did know whom Mr. Smith might have been with. RP 848.

Even after police told Lundberg that Mr. Smith had identified him as his accomplice, Lundberg protested that Mr. Smith was trying to protect someone else. RP 849. He continued to deny his involvement. RP 849.

The police threatened to turn this case over to the FBI for federal prosecution. RP 850. Lundberg knew that a bank robbery was far more serious than a fast food robbery. RP 850.

Lundberg disclosed his involvement only after police threatened to turn the bank robbery over to the FBI. RP 853.

In fact, Mr. Smith originally had contacted him about doing a fast food robbery. RP 850.

Although Lundberg was somewhat opposed to involvement in a fast food robbery, he “somewhat” helped planned the bank robbery. RP 850-851. He chose the bank to be robbed. RP 853. He agreed to provide transportation, the gun, and planned the route away from the bank. RP 851-852. He also received proceeds. RP 852.

Lundberg subsequently pleaded guilty in August 12, 2012, to that bank robbery and other offenses as part of a plea bargain that required him to testify against Mr. Gonzalez. RP 772-773, 774. In addition to pleading guilty to the bank robbery offenses, he pleaded guilty to robbery in the first degree at McDonalds on October 5, 2009 as well as Burger King on October 25, 2009; and also attempted robbery of Wendy’s on October 1, 2009. RP 774. All of these pleas were entered pursuant to the plea agreement that deferred sentencing until after testimony. RP 777.

If the State believed that Lundberg had fulfilled his promise to testify against Mr. Gonzalez, then the State would vacate all counts except the counts related to the bank robbery and a deadly weapon sentencing enhancement attached thereto. RP 775.

If Lundberg testified so that the State believed him, he would be sentenced to 36-48 months in the Department of Corrections plus a 24 month enhancement. RP 775-776. The State's recommendation would be 60 months. RP 776.

At the time of the charged crimes, Lundberg worked at Larson Volkswagen on South Tacoma Way. RP 764. During that time, he had access to vehicles that were for sale. RP 765. His employment terminated in October 2009 because of "some discrepancies" with management. RP 765. The defense was not allowed to inquire about "those discrepancies". RP 861.

Lundberg claimed to have met Mr. Gonzalez by selling him cars. RP 767. He asserted that he had sold him a Jeep Liberty, a Saturn Ion Redline, and a Volkswagen Touareg. RP 767.

Lundberg claimed that he became involved in the McDonalds robbery because Mr. Gonzalez called him and asked him if he wanted to make some money. RP 777-779. Mr. Gonzalez reportedly stated that he had an "inside person" who would give him information about how it could be done. RP 779. Lundberg claimed that he went to Mr. Gonzalez's house to get lights to put on top of the car but he could not remember what city the house was in. RP 781. They put the lights in Lundberg's car,

which was the car used in this event. RP 785. Neither person was armed during this event. RP 788.

Lundberg claimed that while he sat in the car, Mr. Gonzalez approached the car in which the manager and her friend were and which they had followed. RP 786, 788. Mr. Gonzalez got into that car and rode in it back to McDonalds. Lundberg followed and waited while Mr. Gonzalez went inside with the woman. RP 788-789. A short time later Mr. Gonzalez emerged carrying a large McDonalds's bag containing money. RP 788-790. Lundberg asserted that the bag contained just over \$11,000. RP 791.

When Lundberg discussed the McDonalds matter with police, he did not think it was a robbery. RP 865. He thought it was an insurance matter. RP 865.

About 20 days later, the two men went to the Burger King on Mountain Highway. RP 794. "This one wasn't really planned." RP 794. Lundberg claimed that they used Mr. Gonzalez's car, a Volkswagen Touareg, because the lights already were in it and that they just drove out there. RP 794, 795. After the restaurant closed, they followed a person believed to be the manager to her residence. RP 795. Mr. Gonzalez drove. RP 795. Lundberg had a black pellet/BB gun that looked real but that he claimed not to have brought with him. RP 799. There were handcuffs in



the cup holder. RP 799. On cross-examination, Lundberg acknowledged that he had the black pellet/BB gun with him at the Burger King for purposes of intimidation. RP 877.

When they drove up to the gated community, Lundberg jumped out and put the flashing lights on the car. RP 800. When the car stopped, Lundberg approached the woman, who was the passenger. RP 800. Lundberg told her to get into the driver's seat and drive him back to the Burger King. RP 801. When she said that she could not drive, he ordered him to the back seat. RP 801. The male passenger had been ordered into the trunk that Lundberg had opened. RP 802-803.

Lundberg drove to the Burger King, went inside with the woman, and then left with the money. RP 805.

Lundberg claimed that after the robbery the men then drove to his residence, split the \$4,000 - \$5,000 proceeds, and then Mr. Gonzalez left. RP 809-810.

On November 1, 2009, Lundberg participated in a robbery of a Wendy's restaurant on Bridgeport Way in Lakewood. RP 816. He claimed that he was with Mr. Gonzalez. RP 816. Lundberg used his car. RP 817. This robbery was not preplanned; the men went there and watched as the store closed. RP 817.

Multiple employees left the store at the same time but Mr. Gonzalez, whom Mr. Lundberg said had been watching the parties close, directed him to follow a person he had identified as the manager. RP 817-818. As they reached that individual's residence, Mr. Gonzalez reportedly attached the lights to the car. RP 819.

When the car they were following stopped, Lundberg ordered the driver to get out and walk backwards toward him. RP 820. Lundberg handcuffed the driver. RP 822. Mr. Gonzalez spoke to the woman, learned that she was not manager and conveyed that information to Lundberg. RP 823.

Lundberg contacted the woman, went through her purse to look for the keys and also took out her cell phone. RP 824. Lundberg said that he wanted to leave but that Mr. Gonzalez did not. RP 824. Lundberg said that Mr. Gonzalez drove the woman's car a short distance away and was gone for about five-ten minutes before returning. RP 825-826.

During 2009, Lundberg was 6' and weighed about 175 lbs. RP 826. Mr. Gonzalez was shorter and was "chubby." RP 826, 863.

Lundberg had a prepaid phone from the Burger King robbery. RP 834. He kept the phone at his house and his daughter eventually took it to the home of her mother Heather Samuelson. RP 834-835. Lundberg also

had the blue and red flashing lights [used on car top] in a closet at his house. RP 835.

After he was arrested, Lundberg made some phone calls to Heather Samuelson. RP 898. They were not married at that time. RP 898.

Lundberg called on the jail phone which clearly advises that all phone calls are recorded. RP 899. Lundberg knew these phone calls were being recorded. RP 899. During these record phone calls he purposefully asked Samuelson to destroy evidence RP 899-900.

Lundberg called his wife and instructed her “to get everything out of the house that shouldn’t be in the house, including drug paraphernalia, anything related to a gun, anything like that, and I told her there was a bag, which I referred to containing a flashlight, referring to the lights that were in there, and told her just to throw it away.” RP 835-836, 898. He told his wife that “Sam” gave the stuff to him. RP 836.

His wife told him that she knew what he was talking about. RP 836. Lundberg was “pretty sure” she threw it all away. RP 836. He told her about a light in the utility closet but claimed that Mr. Gonzalez gave it to him. RP 899. Lundberg had packaged the light in a plastic bag and put it in his closet. RP 899.

Mr. Gonzalez has been described as overweight and/or heavy all of his life. RP 952, 953. In a family photo taken in Puerto Rico in May 2010,

Mr. Gonzalez weighted approximately 239 lbs, which was the first time his mother had seen him “so skinny.” RP 953. While in Puerto Rico, Mr. Gonzalez did some shopping with his wife and mother. RP 955. He purchased a baseball cap that said “police” on the front. RP 955

The State offered testimony regarding DNA tests and results through witness Matthew Quartaro, a supervisor for DNA analysts at Orchid Cellmark Lab. RP 986. He had not personally performed any of the tests on the vulvar swab or vaginal swab from Zamore-Flores. RP 1009. He described the work as an assembly line: “We have one person who may start the test, examine the evidence, another person may see if they identify semen on those samples, another person would extract the DNA from those samples, another person who may perform the PCR, and then another person who may interpret the data and write the report.” RP 1009.

Mr. Quartaro testified that he did compare the results from the reference samples and compare them to the evidence sample, drew the conclusions, calculated the statistics, and wrote the report. RP 1009.

However, regarding the two samples, the vulvar sample and the vaginal sample, from which positive comparison was made, Mr. Quartaro performed none of the testing. RP 1015.

Mr. Quartaro did not actually handle these sample themselves. RP 1010. He did not perform any of the actual forensic tests, except for the

analysis of the perianal samples. RP 1011. The perianal samples did not identify Mr. Gonzalez as a contributor to those samples. 1012.

**D. LAW AND ARGUMENT:**

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING FOR TO REQUEST AS A JURY INSTRUCTION WPIC 6.05, "TESTIMONY OF ACCOMPLICE", WHERE, WITH A SINGLE ARGUABLE EXCEPTION, THE STATE'S CASE RESTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court defined a two-prong test to establish ineffective assistance of counsel. The first prong of the test requires that a petitioner show that her counsel's performance was deficient. *Strickland*, 466 U.S. at 687. Specifically, in order to succeed on the deficiency prong, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* This requires that the Court examine the entire proceedings and determine "whether, in light of all the circumstances, the [conduct of a petitioner's trial counsel was] outside the wide range of professionally competent assistance." *Id.* at 690.

Accordingly, this Court's inquiry is highly deferential. *Id.* at 689.

The Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, a defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).

Once the deficiency prong is established, a defendant must then show that as a result of the deficient performance, he was ultimately prejudiced. *Strickland*, 466 U.S. at 687. This prong of the test requires that a petitioner show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in that outcome. *Id.* at 699. Thus, a petitioner must show "that counsel's errors were so serious as to deprive [a petitioner] of a fair [hearing] . . . whose result is reliable." *Lockhart I*, 506 U.S. at 369 (internal quotes and citation omitted). The focus is on whether the result of the proceeding is fundamentally unfair or unreliable. *Id.*

A defendant who establishes the second prong, of course, has established the first prong. In *State v. Carothers*, 84 Wn.2d 256, 269-270, 525 P.2d 731(1974), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588, 787 P.2d 906 (1988), the court explained the

need for a jury instruction regarding the viewing of accomplice testimony. That history, summarized below, is consistent with WPIC 6.05, which must be given in every case where the defendant requests it and where the State is based on the uncorroborated testimony of an accomplice.

That instruction, WPIC 6.05, entitled “testimony of accomplice”, provides:

Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

While the cautionary instruction may, in the circumstances of the case, apply only to one witness and the jury will have no doubt about the witness to whom the instruction is referring, the court does not give the jury its evaluation of the particular witness before it. Rather, it instructs the jury about the provisions of a rule of law applicable to the class to which the witness belongs. It is a rule which has long found favor in the law, evolved for the protection of the defendant. There has been no showing before this court that it impedes the administration of justice. The

Washington courts adhere, therefore, to the rule that a cautionary instruction is proper where accomplice testimony is relied upon by the prosecution. *Carothers*, 84 Wn.2d at 270.

In *State v. Allen*, 161 Wn. App. 727; 255 P.3d 784[2011], aff'd 05/09/13, (arguing for a similar instruction in cross-racial identification cases) the court set forth the history of WPIC 6.05, the instruction regarding the scrutiny of accomplice testimony, at issue herein.

The court acknowledged that although judges, based on its many years of experience with witnesses of this type might view such testimony with caution, judges thus have an expertise that ordinary citizens cannot be expected to have. Courts have witnessed innocent persons sent to prison or death upon testimony of an accomplice. At the same time such testimony is not invariably false and it may be the only proof available. *Allen*, 161 Wn. App at 744 citing *Carothers*, 84 Wn.2d at 266-267.

Thus, the court has evolved the special rule, set forth in the instruction on the evaluation of accomplice testimony, in order to protect the defendant. *Id.*

This instruction therefore is far from being objectionable or superfluous. Rather it is mandatory if the prosecution relies upon testimony of an accomplice and the defendant requests it. *Allen*, 161 Wn. App at 744.



A conviction may rest solely upon the uncorroborated testimony of an accomplice only if the jury has been sufficiently cautioned by the court to subject the accomplice's testimony to careful examination and to regard it with great care and caution. *State v. Johnson*, 77 Wn.2d 423, 439, 462, P.2d 933 (1969); *State v. Denney*, 69 Wn.2d 436, 441, 418 P.2d 468, 471 (1966); *State v. Badda*, 63 Wn.2d 176, 181-182, 835 P.2d 859 (1963).

In contrast to the instant case, the convictions in *Johnson*, 77 Wn.2d at 439, *Denny*, 418 Wn.2d at 441; *Badda*, 63 Wn.2d at 181-182 were affirmed *only* because the courts there had given the instruction [WPIC 6.05] thus ensuring that the jury appropriately viewed the accomplice testimony. The trial result, at least from the issue of evaluation of that testimony, could be deemed reliable. *Id.*

The instruction on accomplice testimony is so vital to a fair trial that it is not open to the objection that it singles out the testimony of a particular witness for examination and discussion. *State v. Huff*, 76 Wn.2d 577; 581, 458 P.2d 180 (1969).

Under the facts of this case, the cautionary instruction clearly would have applied only to one witness, Jeffrey Lundberg. This the jury would have had no doubt about the witness to whom the instruction in referring. The instruction thus would have instructed the jury about the

provisions of a rule of law applicable to the class of to which the witness belongs.

Application of the instruction to the facts of this case affirms that trial counsels' errors were so deficient as to deprive Mr. Gonzalez of a trial with a reliable result.

Had the jury been properly instructed, the jury would have carefully examined Lundberg's testimony in the light of other evidence in the case and acted upon it with great caution. Upon carefully considering the testimony, the jury could not have been satisfied beyond reasonable doubt that it was true.

The following deficiencies in Lundberg's testimony would under careful examination in the light of other evidence and action upon it with great caution, fail to satisfy any reasonable fact finder that it was true:

Mr. Gonzalez's convictions rest on the uncorroborated and self-serving testimony of "accomplice" Jeffrey Lundberg. Mr. Lundberg's admissions and accusations came only after a long history of denials and only when he wanted to save himself from federal bank robbery prosecution. RP 770, 774, 846, 847, 848 849, 850, 853.

Lundberg had a sketchy history with law enforcement. Lundberg committed a bank robbery in Lakewood. On February 8, 2010 RP 770. His accomplice in that robbery identified Lundberg to police. RP 849.

Although he steadfastly denied participation in the robbery, Lundberg was arrested and charged with first degree robbery and possession of a firearm in the first degree. RP 770, 774, 846, 847. The bank was close to Lundberg's residence and he acknowledged that he may have had the gun from it in his residence. RP 8847. Lundberg said this might have happened because he had given the accomplice a ride home, the accomplice might have entered his house and stolen his gun. RP 846-847. He said this "could have happened." RP 847.

Later on police returned and informed Lundberg that witnesses had seen his car in the area if the bank at the time of the robbery and that there had been another individual. RP 848. Lundberg continued his lies and said he did know whom his alleged accomplice might have been with. RP 848.

Even after police told Lundberg that Mr. Smith had identified him as his accomplice, Lundberg protested that Mr. Smith was trying to protect someone else. RP 849. He continued to deny his involvement. RP 849.

The police threatened to turn this case over to the FBI for federal prosecution. RP 850. Lundberg knew that bank robbery was far more serious than a fast food robbery. RP 850.

Only then did Lundberg disclose his involvement in the bank robbery. RP 853.

*Mr. Smith originally had contacted him about doing a fast food robbery.* RP 850. [emphasis added]

Although Lundberg purported to be “somewhat opposed” to involvement in a fast food robbery, he “somewhat” helped planned the bank robbery. RP 850-851. He chose the bank to be robbed. RP 853. He agreed to provide transportation, the gun, and planned the route away from the bank. RP 851-852. He also received proceeds. RP 852.

Lundberg subsequently pleaded guilty in August 12, 2011, to that bank robbery and other offenses as part of a plea bargain that required him to testify against Mr. Gonzalez. RP 772-773, 774. In addition to pleading guilty to the bank robbery offenses, he pleaded guilty to robbery in the first degree at McDonalds on October 5, 2009 as well as Burger King on October 25, 2009; and also attempted robbery of Wendy’s on October 1, 2009. RP 774. All of these pleas were entered pursuant to the plea agreement that deferred sentencing until after testimony. RP 777.

Absent Lundberg’s testimony, the State had little evidence upon which to convict Mr. Gonzalez.

Lundberg’s testimony is the only “evidence” corroborating Mr. Gonzalez presence at the McDonald’s robbery.

Ms. Garcia, the victim of this robbery, knew Mr. Gonzalez.

Garcia described her assailant to the police as 5'9", white and "skinny". RF 66. The individual was clearly not Hispanic. RP 73.

Mr. Gonzalez is short and chubby. He has always been short and very chubby. RP 952, 953. Garcia described her assailant to the police as 5'9", white and "skinny". RP 66.

At trial, Garcia did not know if Sam was 5'9". RP 69. In fact, she had not seen him for 3-4 years. RP 69-70. Garcia's primary language is Spanish. RP 70. The individual who assaulted her spoke English with an American accent. RP 71.

During the subsequent investigation, police showed Garcia a photo montage. RP 58. She was not able to identify anyone as her assailant. RP 58.

Despite Ms. Gonzalez's in-court identification, common when there is only person sitting with counsel at the defense table, the fact remains that there is no corroborating evidence other Lundberg's unreliable testimony. Due to trial counsel's ineptitude, the jury was not instructed regarding its obligation to weigh this testimony in a careful and cautious manner, to rely on it only if they found it credible beyond a reasonable doubt.

Had the jury done so, even considering police testimony regarding Ms. Garcia's inability to make any identification from photo montages, the

lack of finger print evidence, etc., Ms. Garcia's discrepant physical description of Mr. Gonzalez with his actual physical appearance.

(a) Lundberg's testimony is the only "evidence" corroborating Mr. Gonzalez presence at the Burger King robbery.

On October 24-25, 2009, Ms. Espinoza and her co-workers closed the Burger King on Mountain Highway. Her son came to give her a ride home. RP 227-228.

Espinoza and her son observed a black SUV with shiny lights as they drove up to their gated community. RP 229, 279. Two "police officers" approached their car and ordered them out it before they entered their community. 230, 231, 286, 294.

The two men were described as about 5'8" and weighing 130 lbs. RP 295. However, Munoz described the man who put him in the trunk as "stockyish" despite these identical physical descriptions. RP 293-294.

Neither Espinoza could provide a more detailed description of the men, exception to describe that one of the men wore a light colored grey hooded sweatshirt that was pulled up over his head. RP 365. There was a logo on the front of the hoodie. RP 366. The person also wore a baseball hat and gloves. RP 365. The person held a handgun in the left hand. RP 366.

Police obtained a security video from the entrance to the gated community and noted that the black SUV appeared to have “flashing emergency lights”. RP 415. . There was no clear photo of the second vehicle, prohibiting any description. RP 416. . There was no clear photo of the second vehicle, prohibiting any description. RP 416.

The State’s case rested upon the testimony of Lundberg. The jury lacked the necessary instruction to evaluate this testimony. Trial counsel’s deficiency in requesting this mandatory instruction resulted in an unreliable verdict.

(b) Physical evidence was found at Lundberg’s residence.

Lundberg told police he had a firearm at his residence. RP 847-848. He had the flashing lights for the car in a bag in his closet. RP 835-836, 898, 899.

He had instructed Heather Samuels via recorded jail phone calls to get rid of everything. RP 898-899.

He gave Samuelson’s daughter a cell phone from one of the robberies. RP 834-835.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO COUNT THE THREE RAPE CONVICTIONS AS ONE CRIME WHERE THE ACTS INVOLVED THE SAME OBJECTIVE INTENT.

The calculation of an offender score, as a matter of law, is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). But underlying factual determinations, such as same criminal conduct, are reviewed for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Whether multiple sexual assaults on a single victim count as a single offense depend on whether the assault involved a single objective intent. In *State v. Walden*, 9 Wn. App. 183; 847 P.2d 956 (1993), the court held that two convictions for sexual assault against the same victim counted as the one count because they involved “the same criminal objective.” This is so because when viewed objectively the criminal intent of the of the conduct was the same. In addition to involving the same victim, the time and place of the crime remained the same.

In *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997) the court rejected the defendant’s claim that his multiple sexual assaults against the same victim involved “the same criminal objective. The court did so because after the first act, the defendant had time to form a new



intent to commit the second, so that the two sequential rapes counted separately. In that case, the victim begged the defendant to let her go home after the first incident and the defendant slammed her head into the wall and otherwise physically subdued her. *Id.* These acts and the interval of time broke “the same criminal objective.”

In this case, assuming that the State proved beyond a reasonable doubt that Mr. Gonzalez raped Y.F-Z, the trial court erred by counting the three rapes as separate charges for purposes of calculation of offender score and sentencing.

Because Mr. Gonzalez’ first degree rape conviction properly should have been counted as a single rape conviction, his correct offender score for the rape offense was 120-160 months. ***RCW 9.94A.525(17)***; See Washington State Sentencing Guidelines Manual, Standard Range for Rape First Degree.

As a consequence of the re-calculation of the rape offender score, all of the other offender scores and standard ranges changes, except for criminal impersonation, which is an unranked felony with a standard range of 0-12 months. See Washington State Sentencing Guidelines Manual, Standard Range for Criminal Impersonation.

According to the State’s calculation of the standard ranges for the other counts, the standard ranges for the first degree kidnapping charges

remain the same, 51-58 months. The standard ranges for first degree robbery re-calculate to 77-102 months. **RCW 9.94A.525(17)**; See Washington State Sentencing Guidelines Manual, Standard Range for First Degree Kidnapping. CP 236-253.

Based on the correct legal determination that the rapes are a single act and therefore count as a single conviction, the standard range for that count is 120-160 months. Because rape in the first degree is a serious violent offense under the Sentencing Reform Act which requires consecutive scoring, Mr. Gonzalez's sentence is reduced by 246 months. **RCW 9.94A.525(17)**; See Washington State Sentencing Guidelines Manual, Standard Range for Rape First Degree; CP 236-253.

Further, the rescoring of the first degree rape conviction and the recalculation of the standard ranges for the first degree robbery convictions from 129-171 months to 77-102 months removes 69 months from his sentence, assuming high end. **RCW 9.94A.525(8)**. See Washington State Sentencing Guidelines Manual, Standard Range for Robbery First Degree; CP 236-253.

As a result of the corrected standard ranges, Mr. Gonzalez's sentence should have been 160 for first degree rape [Count I], 102 months for the first degree robbery [Count VI], and 171 months for the first degree kidnapping [Count 171]. Mr. Gonzalez's total sentence therefore

should have been 604 months to life, instead of the 720 months to life that the court imposed. CP 236-253. **RCW 9.94A.525**; *See Washington State Sentencing Guidelines Manual*.

3. MR GONZALEZ IS ENTITLED TO DISMISSAL OF HIS  
CONVICTIONS BECAUSE THE STATE FAILED TO PROVE  
THEM BEYOND A REASONABLE DOUBT.

The **test** as to the **sufficiency** of the **evidence** is “whether, after viewing the **evidence** in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.” *Yates*, 161 Wn.2d 714, 786, 168 P.3d 359 161 Wn.2d at 786 (2007) (quoting *State v. Brown*, 132 Wn.2d 529, 551, 940 P.2d 546 (1997)). Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate courts defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000).

The State charged Mr. Gonzalez with a series of kidnappings in the first degree, robberies in the first degree, rapes in the first degree, and one charge of criminal impersonation. Each incident and the charges relating thereto is discussed separately below.

Applicable to all charges, however, is the significant fact that absent Lundberg's testimony, there would be no evidence whatsoever connecting Mr. Gonzalez to any of the crimes, except arguably to the counts involving Y Z-F and Lisvi Munoz.

Similarly, the strength of the State's evidence is rendered not truthful beyond a reasonable doubt when viewed through the appropriate vantage point for accomplice testimony. *Carothers, supra*.

Moreover, because Lundberg gave a telephone from one of the robberies to Heather Samuelson's daughter affirms that Lundberg lied to the police from his initial contact with them. RP 834-835.

Lundberg's assertion that Mr. Gonzalez used his mother's Lexus SUV in one of the crimes is not supported by any evidence. His mother

subsequently traded in the vehicle and police later found an envelope with Mr. Gonzalez's name under a seat. RP 748. This proves nothing. A family member may well leave items in a car belonging to other family members. not fit description of other suspect.

Mr. Gonzalez, a "chubby" shorter fellow weighing well over 239 lbs. and standing about 5'6"-7", did not match the description of any of the assailants as "tall and skinny." RP 953.

*Kidnapping in the First Degree, Counts IV, V, IX, XI, XII*

The elements of the charge of first degree kidnapping as charged in this case are:

§ 9A.40.020. Kidnapping in the first degree:

(1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:

(b) To facilitate commission of any felony or flight thereafter;

*Robbery in the First Degree, Counts VI, VIII, X, XII*

The elements of robbery in the first degree as charged in this case are:

§ 9A.56.200. Robbery in the first degree

A person is guilty of the crime of robbery in the first degree if he or she:

(1) Unlawfully takes personal property from the person [or in the presence] of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person *[or to that person's property] [or to the person or property of another];*

(4) That force or fear was used by the defendant *[to obtain or retain possession of the property] [or] [to prevent or overcome resistance to the taking] [or] [to prevent knowledge of the taking];*

(5) [(a)] That in the commission of these acts *[or in immediate flight therefrom]* the defendant *[was armed with a deadly weapon]] [or]*

[(b)] That in the commission of these acts *[or in the immediate flight therefrom]* the defendant displayed what appeared to be a firearm or other deadly weapon;] *[or]*

[(c)] That in the commission of these acts *[or in the immediate flight therefrom]* the defendant inflicted bodily injury;] *[or]*

[(d)] That the defendant committed the robbery within and against a financial institution;] and

(6) That any of these acts occurred in the State of Washington.

*§ 9A.44.045 Rape in the First Degree, Counts I, II, III*

A defendant is guilty of the crime of rape in the first degree, if he or she

(1) Engages in sexual intercourse with another person;

(2) That the sexual intercourse was by forcible compulsion;

(3) That the defendant *[or an accomplice]*

[(a)] used or threatened to use a deadly weapon or what appeared to be a deadly weapon] *[or]*

[(b)] kidnapped the other person] *[or]*

[(c)] inflicted serious physical injury]

(4) That any of these acts occurred in the State of Washington.

§ 9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting **rape in the first degree**, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(2) That any of these acts occurred in the State of Washington.

§ 9A.60.040. **Criminal impersonation** in the first degree – Count VII

(1) A person is guilty of **criminal impersonation** in the first degree if the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose;

(2) That the acts occurred in the State of Washington.

f. McDonald's Restaurant Robbery Convictions

Mr. Gonzalez was convicted of first degree robbery of Maria Espinoza in Count X; CP 185.

Mr. Gonzalez was convicted of first degree kidnapping of Viviana Garcia in Count IX, CP 186.

Absent the uncorroborated testimony of Lundberg, the State did not prove beyond reasonable doubt that Mr. Gonzalez committed any of these crimes.

Garcia could not identify Mr. Gonzalez as her assailant. Mr. Gonzalez is short and chubby. He has always been short and very chubby. RP 952, 953.

Garcia described her assailant to the police as 5'9", white and "skinny". RP 66. The individual was clearly not Hispanic. RP 73.

At trial, Garcia did not know if Sam was 5'9". RP 69. In fact, she had not seen him for 3-4 years. RP 69-70. Garcia's primary language is Spanish. RP 70. The individual who assaulted her spoke English with an American accent. RP 71.

During the subsequent investigation, police showed Garcia a photo montage. RP 58. She was not able to identify anyone as her assailant. RP 58.

g. Burger King Restaurant Robbery Convictions

Mr. Gonzalez was convicted of kidnapping in the first degree of Juan Espinoza in Count XI; CP 188.

Mr. Gonzalez was convicted of kidnapping in the first degree of Maria Espinoza in Count XII; CP 189 – first degree robbery of Maria Espinoza. CP 187.

Again, these convictions rested only on the uncorroborated testimony of Lundberg. Mr. Gonzalez is short and chubby. He has always been short and very chubby. RP 952, 953.



Once again, the victims described the perpetrators as skinny. The two men were described as about 5'8" and weighing 130 lbs. RP 295. Mr. Gonzalez' own mother considered him "so skinny" when he weighed 239 lbs., more than 100 lbs more than the estimated weight of the perpetrators. RP 953. This is not a subtle difference or one that is easy to misjudge.

The only other testimony assisting in the identification of the perpetrators was a description of the clothing worn by the man who entered the Burger King. That man wore a light colored grey hooded sweatshirt that was pulled up over his head. RP 365. There was a logo on the front of the hoodie. RP 366. The person also wore a baseball hat and gloves. RP 365. The person held a handgun in the left hand. RP 366.

Police also obtained a security video from the entrance to the gated community and noted that the black SUV appeared to have "flashing emergency lights". RP 415. However, the quality of the video prohibited the identification of the make of the vehicle. *Id.*

Thus, absent Lundberg's testimony the State would not have been able to prove its case.

h. Wendy's Restaurant [Attempted Robbery]

Convictions

Mr. Gonzalez was convicted of first degree rape for the digital-vaginal rape of Y.Z-F in Count I CP 176; first degree rape for the penile-vaginal rape of Y.Z-F as charged in Count II, CP 178; and rape in the first degree as charged in Count III for the penile-oral rape of Y.Z-F

Mr. Gonzalez was convicted of the first degree kidnapping of Y.Z-F in Count IV; CP 181.

Mr. Gonzalez was convicted of first degree kidnapping of Lisvi Munoz; CP 182.

Mr. Gonzalez was convicted of first degree robbery of Y.Z-F; CP 183;

Mr. Gonzalez was convicted of criminal impersonation in the first degree as charged in Count VII, CP 184.

In this incident, assuming that this court affirms the admission of the DNA evidence, Mr. Gonzalez's convictions for rape in the first degree are supported by sufficient evidence. Under the standard for review of the sufficiency test, this court also may find the State proved beyond a reasonable doubt the other charges in the Wendy's restaurant attempted robbery incident.

E. CONCLUSION:

For the foregoing reasons, Mr. Gonzalez respectfully asks this court to dismiss counts I, IX, VIII, XI based upon the State's failure to prove the case beyond a reasonable doubt. Alternatively, Mr. Gonzalez respectfully asks this court to order a new trial based on ineffective assistance of counsel so that a jury, properly instructed, may weigh the informant accomplice's testimony under the proper standard. In the event that the court affirms Mr. Gonzalez's convictions, he asks this court to remand the matter for re-sentencing.

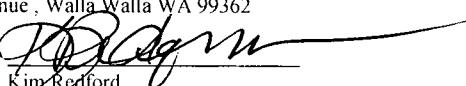
RESPECTFULLY SUBMITTED this 12<sup>TH</sup> day of November,  
2013.

  
\_\_\_\_\_  
BARBARA COREY, WSBA#11778  
Attorney for Appellant Gonzalez

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws  
Of the State of Washington that the following is a true  
and correct: That on this date, I delivered via ABC- Legal  
Messenger, a copy of this Document to: Kathleen Proctor,  
Pierce County Prosecutor's Office, 930 Tacoma Ave So,  
Room 946 Tacoma, Washington 98402 and to US Mail postage  
pre-paid Samuel Gonzalez, DOC#362884, Washington State Penitentiary  
1313 North 13th Avenue, Walla Walla WA 99362

11/12/13

  
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# APPENDIX A

### Testimony of an Accomplice

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.